UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. 17-1895**
	)	
EDWARD L. CALVERT,	)	
	)	
Appellee.	)	

Appeal from the United States District Court
For the Southern District of Indiana
Case No. 1:16-CV-00161-SEB-MJD
The Honorable Judge Sarah Evans Barker

BRIEF OF APPELLANT NATIONAL LABOR RELATIONS BOARD, IN SUPPORT OF APPEAL FROM DISTRICT COURT ORDER AFFIRMING BANKRUPTCY COURT'S ORDER DETERMINING DEBTOR ENTITLED TO DISCHARGE

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JURISDICTIONAL STATEMENT

Pursuant to 11 U.S.C. § 523(a)(6), the National Labor Relations Board (the "NLRB" or "Appellant") filed an adversarial complaint in the Bankruptcy Court for the Southern District of Indiana on January 2, 2015, seeking a determination that certain debts owed to former employees of Debtor Edward Lee Calvert ("Debtor" or "Calvert"), to remedy the unlawful injuries he caused them, are nondischargeable pursuant to, *inter alia*, 11 U.S.C. § 523(a)(6) of the Bankruptcy Code. [1] [Appx. Ex. 1].[2] On December 21, 2015, the bankruptcy court issued a Judgment Order, denying the relief sought by the NLRB and granting Calvert a discharge in bankruptcy. [Appx. Exs. 10 and 11]. On January 19, 2016, Appellant filed its appeal with the United States District Court for the Southern District of Indiana, which had subject matter jurisdiction to hear the appeal pursuant to 28 U.S.C § 158(a)(1). [Appx. Ex. 12].

On March 31, 2017, the district court issued its Judgment and Order affirming the bankruptcy court's ruling. [Appx. Exs. 13 and 14]. The NLRB timely filed a Notice of Appeal on April 28, 2017. [Appx. Ex. 15]. This Court has jurisdiction pursuant to 28 U.S.C § 158(d)(1), which provides the circuit courts of appeals with appellate jurisdiction of appeals from all final decisions, judgments, and orders entered by the district courts in bankruptcy cases; and 28 U.S.C. § 1291, which

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[1] The bankruptcy court's disposition of the NLRB's other claims, seeking nondischargeability in bankruptcy pursuant to 11 U.S.C. §§ 727(a)(3) and (a)(4), were not raised on appeal to the district court.

[2] References to the record below are made by citations to the NLRB's Appendix, submitted with its brief as follows: [Appx. Ex. --, p. --].

provides the circuit courts of appeals with appellate jurisdiction over final judgments of district courts.

STATEMENT OF ISSUES PRESENTED

1. Whether the bankruptcy court and district court erred by failing to consider and give preclusive effect to the decision and factual findings of an administrative law judge in proceedings before the NLRB upon which the NLRB's claim against Calvert is based.

2. Whether the bankruptcy court and district court erred by finding the NLRB did not prove by a preponderance of the evidence the element of malice required for establishing nondischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6), where this Court had already adjudicated Calvert's discharge of his employees as a violation of federal law.

3. Whether the bankruptcy court and district court erred by requiring that, in order to establish malice under 11 U.S.C. § 523(a)(6), the NLRB must prove that Calvert acted with specific intent to cause harm when he discharged his employees.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

This bankruptcy appeal arises from an administrative proceeding conducted by the NLRB. That proceeding culminated in a decision and order issued on July 29, 2005, finding that ELC Electric, Inc. ("ELC") committed certain unfair labor practices in violation of the National Labor Relations Act. 29 U.S.C. §§ 151-169.

E.L.C. Elec., Inc., 344 NLRB 1200 (2005). [Appx. Ex. 7]. The NLRB found, in pertinent part, that Calvert alone made the decision to discharge employees, with the intention of thwarting the employees' right to pursue union representation—a right protected by federal law. Later, on November 8, 2012, the NLRB issued a Supplemental Decision and Order reported at *E.L.C. Elec., Inc., & Its Alter Ego &/or Successor Midwest Elec. & Retail Contractors, Inc., d/b/a MERC, Inc., & Asset Mgmt. Partners, Inc., A Single Integrated Enter. & Single Employer, & Edward L. Calvert, Individually*, 359 NLRB No. 20 (2012), finding, *inter alia*, that because Calvert had created new corporate identities, Midwest Electric & Retail Contractors, Inc. and Asset Management Partners, Inc., for the express purpose of avoiding ELC's liability, Calvert was *personally* liable for the backpay award, jointly and severally with the corporate respondents. [Appx. Ex. 8]. On June 20, 2013, this Court issued a judgment, which it amended on July 23, 2013, enforcing the NLRB's 2012 order in full. *National Labor Relations Board v. E.L.C. Electric, Inc.*, No. 13-1952 (7th Cir.). [Appx. Ex. 9].

On December 19, 2013, Calvert filed a Chapter 7 petition in the Bankruptcy Court for the Southern District of Indiana seeking a discharge of his debts under Section 727 of the Bankruptcy Code. The NLRB filed a proof of claim for the backpay due to the injured employees. [Appx. Ex. 3, p. 6, n. 3]. *See Nathanson v. NLRB*, 344 U.S. 25, 27 (1952) (NLRB enforces backpay orders as agent for the injured employees). On January 2, 2015, the NLRB filed an adversary complaint against Calvert seeking, among other things, to have his debt to the NLRB

adjudicated nondischargeable pursuant to 11 U.S.C. § 523(a)(6). [Appx. Ex. 1]. On September 23, 2015, a trial was held on the issues alleged in the NLRB's adversary complaint. [Appx. Exs. 5 and 6]. On December 21, 2015, the bankruptcy court issued its Order and Findings of Fact and Conclusions of Law, determining, *inter alia*, that the Debtor's debt was not excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). [Appx. Exs. 10 and 11].

On January 19, 2016, the NLRB filed its appeal with the United States District Court for the Southern District of Indiana. [Appx. Ex. 12]. On March 31, 2017, the district court issued its Judgment and Order affirming the bankruptcy court's ruling. [Appx. Exs. 13 and 14]. On April 27, 2017, the NLRB appealed the district court's decision to this Court. [Appx. Ex. 15].

II. Relevant Facts

A. The administrative proceeding that gave rise to the NLRB's claim against Calvert

The NLRB is an independent federal agency created by Congress to enforce and administer the National Labor Relations Act, 29 U.S.C. §§ 151-169 (the "Act"), which proscribes certain conduct by employers and by labor organizations as unfair labor practices. Congress has empowered the NLRB with exclusive jurisdiction to prevent and remedy the commission of such unfair labor practices.[3] *See Amalgamated Util. Workers v. Consol. Edison Co.*, 309 U.S. 261, 264-65 (1940).

[3] The Act, as amended, separates the NLRB's prosecutorial and adjudicatory functions. The General Counsel's staff conducts an investigation, and issues and prosecutes administrative complaints. 29 U.S.C. § 153(d); 29 C.F.R. §102.15. After a hearing and decision by an administrative law judge, 29 C.F.R. §§ 102.34,102.45(a),

Debtor Calvert was the sole owner and president of ELC, an electrical contractor operating in the area of Indianapolis, Indiana. [Appx. Ex. 7, pp. 1205-06]. In July 2002, with the help of ELC employees, the International Brotherhood of Electrical Workers, Local 481 (the "Union") organized and sought to become the certified bargaining representative for the rank-and-file employees of ELC. [Appx. Ex. 7, p. 1206].

On September 26, 2002, pursuant to its established procedures for conducting representation elections, the NLRB conducted a secret-ballot election in a unit of electricians employed by ELC to determine whether a majority of them desired to be represented by the Union for the purpose of collective bargaining. Prior to the election, Calvert campaigned against the Union. [Appx. Ex. 7, p. 1200; Ex. 10, p. 4, ¶ 10(c)]. The election results were inconclusive because the voting eligibility of six employees had been challenged at the polls, presenting an issue to be resolved administratively by the NLRB. In addition, the Union filed objections to the election alleging that ELC had engaged in conduct that unduly influenced the election results, as well as unfair labor practice charges alleging ELC had committed numerous violations of the Act. [Appx. Ex. 7, p. 1200; Appx. Ex. 10, p. 4, ¶ 12].

In January and February 2003, ELC terminated the employment of three members of a union organizing committee; and, on March 14, 2003, he permanently

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the parties may file exceptions to that decision with the Agency's five-member adjudicatory body, i.e. "the Board." 29 U.S.C.. § 102.46. The Board then issues a decision and order, constituting the final agency determination. 29 U.S.C. § 160(c); 29 C.F.R. § 102.48. That final decision is reviewable in the United States courts of appeals. 29 U.S.C. § 160(e), (f).

laid off thirteen more employees who constituted the entirety of ELC's rank-and-file workforce. [Appx. Ex. 7, pp. 1210-12].[4] The Union filed charges with the NLRB alleging that ELC had, by these discharges, discriminated against its employees for engaging in their statutory rights protected by the Act [Appx. Ex. 7, p. 1205], in violation of 29 U.S.C. §§ 157, 158(a)(1) and (3).

The NLRB conducted an evidentiary hearing before an Administrative Law Judge ("ALJ") to resolve the objections to the election, challenged ballots, and pending unfair labor practice allegations.[5] [Appx. Ex. 7, p. 1205]. Calvert appeared at that hearing and was represented by counsel. [Appx. Ex. 7, p. 1204]. Following the submission of post-hearing briefs, the ALJ issued his decision on April 7, 2004. On July 29, 2005, the NLRB affirmed the ALJ's rulings, findings, and conclusions as modified, adopted the recommended order as modified, and adopted the ALJ's recommendation that the election be set aside and a new election held. *E.L.C. Elec., Inc.*, 344 NLRB 1200 (2005) ("NLRB Order I"). [Appx. Ex. 7]. The NLRB found that ELC had committed numerous unfair labor practices in violation of the Act. [Appx. Ex. 7, pp. 1203-04].

In so holding, the NLRB made the following specific factual findings:

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[4] The only rank-and-file employees who were not discharged were promoted to supervisory status. While Calvert could not recollect the details of these promotions at the bankruptcy hearing [Appx. Ex. 6, pp. 35-36], the underlying unfair labor practice proceeding established that in about March 2003, in conjunction with the discharges, Calvert promoted two employees, leaving him with no rank-and-file employees eligible to vote in a re-run election. [Appx. Ex. 7, p. 1212].

[5] The NLRB's ALJ conducted a trial in Indianapolis, Indiana, on August 20 to 22, and November 4 and 5, 2003. [Appx. Ex. 7, p. 1205].

- ELC committed numerous unfair labor practices in retaliation against its then employees because they had engaged in a union organizing effort that culminated in a union election. [Appx. Ex. 7, p. 1209].
- ELC's unfair labor practices interfered with the election results. [Appx. Ex. 7, p. 1200].
- Among those unfair labor practices was the unlawful discriminatory discharge of all 16 of ELC's bargaining-unit employees. [Appx. Ex. 7, pp. 1200, 1219-20]. More specifically, in January and February 2003, ELC unlawfully terminated three employees, then on March 14, 2003, ELC terminated its remaining 13 employees. [*Id.*]
- Calvert alone made the decision to discharge ELC's 13 electrical employees on March 14, 2003. [Appx. Ex. 7, p. 1219]. His intention was to thwart his employees' pursuit of union representation by terminating them as ELC employees while continuing to use their services as employees of labor contractors. [Appx. Ex. 7, p. 1219]. Thus, Calvert "laid off [ELC's] employees on March 14, 2003, because of their union activities, to wit, to avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees." [Appx. Ex. 7, p. 1219].
- Calvert did not decide to "eliminate . . . employees who performed electrical work and to switch to the use of labor contractors" for any of the three "shifting reasons" he gave during the course of his testimony at

the trial: (1) for increased productivity and profitability; (2) because "[the company's] workload was down," and (3) because he did not feel his administrative staff could keep up with "so many employment laws and regulations." [Appx. Ex. 7, pp. 1219-20]. Calvert's testimony on this issue was "wholly unreliable . . ." and it was rejected. [Appx. Ex. 7, p. 1220].

- Rather, Calvert acted not based on legitimate business considerations, but with unlawful anti-union animus that violated the employees' rights to engage in activity protected by the Act. [*Id.*].

To remedy these unfair labor practices, the NLRB ordered ELC, its officers, agents, successors, and assigns, to, among other things, make whole the employees that it had unlawfully terminated. [Appx. Ex. 7, pp. 1220-21]. Though entitled to seek review of NLRB Order I with this Court, (29 U.S.C. § 160(f)), Calvert failed to do so.

On November 8, 2012, following another evidentiary hearing, the NLRB issued its Supplemental Decision and Order, again adopting the findings and conclusions of the ALJ. *E.L.C. Elec., Inc., et al*, 359 NLRB No. 20 (2012) ("NLRB Order II"). [Appx. Ex. 8]. In NLRB Order II, the NLRB found that once again, Calvert had embarked on a scheme to thwart his responsibilities under the Act, by creating new corporate identities, Midwest Electric & Retail Contractors, Inc. and Asset Management Partners, Inc., for the express purpose of avoiding ELC's liability under NLRB Order I; that both were alter egos of ELC, that Calvert "had sole and total control" of ELC [Appx. Ex. 8, p. 8]; and that Calvert himself disregarded the

separateness of the corporate identities, commingled corporate funds with his own, and diverted funds, by which he "sought to evade his legal obligations to pay the backpay owed to the 16 discriminatees." [Appx. Ex. 8, p. 9]. The NLRB further found that Calvert was personally liable for the backpay award, jointly and severally with the other respondents, because "[a]llowing him to shirk his backpay obligation by such conduct would work a manifest injustice and be untenable." [Appx. Ex. 8, p. 9]. To remedy these unfair labor practices, the NLRB directed Calvert, ELC, and the newly created entities Midwest Electric & Retail Contractors, Inc., and Asset Management Partners, jointly and severally, to pay the amounts owed. [Appx. Ex. 8, pg. 10).[6] On June 20, 2013, this Court entered its Judgment, enforcing NLRB Order II in full, and enforced the NLRB's modified Order on July 23, 2013. [Appx. Ex. 9].[7] The Court's Judgment thus requires Calvert and his companies to pay his employees a total of $437,427 plus interest.

[6] The issues resolved at the 2012 hearing entailed the derivative liability of Calvert's new corporate entities and of Calvert personally, for the monetary remedy imposed on ELC by Board Order I. The specific amounts of backpay were resolved by an earlier Order of the NLRB granting partial summary judgment as to the amounts owed to the 13 employees discharged on March 15, 2003 [Appx. Ex. 8, p. 2, n. 3], and by stipulation between Calvert and the NLRB's General Counsel at the second evidentiary hearing as to the amounts owed to the three union organizing committee members. [Appx. Ex. 8, p. 2].

[7] On May 31, 2013, the Board issued an order modifying NLRB Order II to include a provision for compliance with its decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012) (requiring respondents to compensate discriminatees for adverse income tax consequences of a lump sum backpay award).

B. Calvert files for bankruptcy, the NLRB commences an adversarial action, and the bankruptcy court denies the NLRB's dispositive motion

On December 19, 2013, less than five months after entry of this Court's July 23, 2013 Judgment, Calvert filed a Chapter 7 bankruptcy petition seeking a discharge of his debts [Appx. Ex. 1, pg. 2], including the one imposed by this Court's Judgment.[8] The NLRB initiated an adversary proceeding in that case, alleging that Calvert's conduct in terminating his employees constituted willful and malicious injury, and seeking, *inter alia*, to have its claim for the backpay resulting from the unfair labor practices adjudicated nondischargeable pursuant to 11 U.S.C. § 523(a)(6). [Appx. Ex. 1]. That section provides an exception to discharge for a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity". The NLRB subsequently moved the bankruptcy court for entry of summary judgment, asserting that the material facts supporting the NLRB's nondischargeability claim had been adjudicated in the NLRB's unfair labor practice proceedings, and that the bankruptcy court should rely on the findings and conclusions in NLRB Order I. [Appx. Ex. 4, p. 2].

[8] The NLRB's Proof of Claim for $435,382, includes $399,222 in backpay, and reflects a small percentage of amounts recovered through a protective restraining order entered against Calvert in his individual capacity and the corporate respondents in district court case No. 1:13-mc-00130 (S.D. Ind.), plus accrued interest computed as of November 30, 2013. [Appx. 3, p. 6, n. 3: Case 13-bk-13079 (S.D. Ind.) Claim 5-1]. The District Court observed and the NLRB concedes, there is no record evidence that Calvert personally made the decision to discharge the three organizing committee members. [Appx. Ex. 13, p. 4, n. 1]. Accordingly, the NLRB's claim that Calvert's debt is nondischargeable is limited to the backpay amounts owed to the 13 employees discharged on March 15, 2003.

The bankruptcy court, on September 1, 2015, issued an order denying the NLRB's motion for summary judgment. [Appx. Ex. 4]. With regard to § 523(a)(6), the bankruptcy court held that "[i]njury" occurs when there is a "'violation of another's legal right, for which the law provides a remedy.'" [Appx. Ex. 4, p. 4] (quoting *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013)). Establishing the "willfulness" element of a 11 U.S.C. § 523(a)(6) claim, the bankruptcy court reasoned, requires a "'deliberate or intentional *injury*.'" [Appx. Ex. 4, p. 4] (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998)). Finally, with respect to the element of malice, the court held that "[m]aliciousness requires the debtor to act 'in conscious disregard of one's duties or without just cause or excuse; *it does not require ill-will or specific intent to do harm*.'" [Appx. Ex. 4, p. 4] (emphasis added) (quoting *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994)). While the court expressly noted that any specific findings made by the ALJ as to Calvert's intent to cause injury would be binding upon it under the doctrine of collateral estoppel [Appx. Ex. 4, p. 5], it found that it was not bound by collateral estoppel because the legal standards in the NLRB proceeding were not equivalent to those to establish nondischargeability. [Appx. Ex. 4, pp. 4-5].

In particular, the court found that "the level of '*mens rea*' required for a determination of nondischargeability is not the same with respect to an unfair labor practice determination under § 8(a) of the National Labor Relations Act." [*Id.*]. With respect to the findings of the NLRB, the court "[did] not find a sufficient level of 'specific findings' as to Calvert's intent that would enable it to give those decisions

preclusive effect as to the issue of liability (nondischargeability)." [Appx. Ex. 4, p. 6].[9] Accordingly, the bankruptcy court concluded that the finding of antiunion animus in the NLRB proceeding did not compel a finding that Calvert had the subjective intent required by § 523(a)(6). Instead, the court concluded that it would itself "analyze whether the facts proven at trial, particularly with respect to the *intent of Calvert to harm the subject employees*, will support a conclusion of nondischargeability." [Appx. Ex. 4, p. 6] (emphasis added).

C. The bankruptcy court discharges Calvert's debt to the NLRB without considering the prior adjudication

A trial on the issues raised in the NLRB's adversary complaint was held on September 23, 2015. [Appx. Exs. 5 and 6]. During that trial, Calvert testified that, among other things, at the time of the union election, he knew that federal law gave the employees the right to organize a union at the Company, that supervisors and temporary employees were ineligible to vote, and that a prospective bargaining unit would be comprised only of his rank-and-file employees. [Appx. Ex. 10, p. 4, ¶ 10(b) and (d)]. Calvert understood that by retaining only his supervisory staff, he had discharged all employees eligible to organize a labor union at the Company. [Appx. Ex. 10, p. 5, ¶ 14(b)]. The NLRB presented as evidence the ALJ's findings that Calvert had terminated his employees in violation of Federal labor law and that his three nondiscriminatory reasons were pretextual. [Appx. Ex. 6, p. 10, Plaintiff's

[9] In this regard, the court indicated its agreement with the reasoning of the court in *In re Gordon*, 303 B.R. 645, 657 (Bankr. D. Colo. 2003). This case is inapposite however, because it involved solely a determination of the willfulness of the injury. 303 B.R. at 659-60. In contrast, this appeal involves the maliciousness of the intent with which it was committed, a different element of nondischargeability.

Trial Exhibit 2 (admitted without objection)]. Despite this prior adjudication of these key facts, the bankruptcy judge questioned Calvert at the adversary proceeding as to his reasons for terminating his employees and accepted his testimony of a freshly minted justification for his actions that had already been found to be unlawfully discriminatory. [Appx. Ex. 6, pp. 74-76].

On December 21, 2015, the bankruptcy court issued its Order and Findings of Fact and Conclusions of Law, and entered judgment that Calvert's debt to the NLRB was not excepted from discharge. [Appx. Exs. 10 and 11]. The court found that Calvert's decision to promote or lay off all of ELC's bargaining-unit employees prevented them from exercising their rights under the Act and that this was an injury under § 523(a)(6). [Appx. Ex. 10, p. 14, ¶ 12]. And, since Calvert was substantially certain that this injury would result from his actions, the bankruptcy court found both that Calvert's actions had caused an "injury" and that it was "willful." [Appx. Ex. 10, p. 14, ¶ 13].

Turning to the final element of malice, however, the bankruptcy court framed its task as "contending with two competing reasons for the layoffs/promotions: (i) the NLRB's position that Calvert acted 'in conscious disregard' of the organizational rights of the Company's employees; or (ii) Calvert's 'just cause or excuse' to save the Company money." [Appx. Ex. 10, pp. 14-15, ¶ 14]. The court disregarded the prior NLRB adjudication that Calvert had laid off his work force for an unlawful reason, which included rejection of Calvert's purported business reasons for doing so at the time and a finding that those reasons were pretextual, and instead, credited

Calvert's most recent rationalization as to why he switched from using ELC's own employees to using temporary help from labor contractors, i.e., in order to avoid audits by the Indiana Department of Labor on common wage projects. Thus, the court found:

> The NLRB did not present evidence from which the Court can conclude that, at the time the decision was made, it was more likely than not that Calvert consciously disregarded the organization rights of the Company's employees when Calvert presented uncontroverted evidence of a legitimate business reason for the layoffs/promotions. [Appx. Ex. 10, p. 15, ¶ 14(b)].

The court accordingly concluded that the NLRB did not prove by a preponderance of the evidence that Calvert acted maliciously, and that his debt was not excepted from discharge pursuant to § 523(a)(6). [Appx. Ex. 10, p. 15, ¶ 15].

D. The district court upholds the bankruptcy court's Order

Upon the NLRB's appeal, on March 31, 2017, the district court issued its Order on Bankruptcy Appeal, affirming the bankruptcy court's Order. [Appx. Ex. 13 and 14]. Regarding the "malice" prong, the district court held that the NLRB failed to show that preclusive effect should be given to the NLRB's underlying unfair labor practice determination that Calvert intentionally terminated his employees to avoid the employees exercising their federal labor rights. [Appx. Ex. 13, pp. 11-12]. Reviewing the factual findings for clear error, the district court found that the bankruptcy court did not err by relying upon Calvert's testimony at trial as to his reason for terminating his workforce. [Appx. Ex. 13, p. 15]. This appeal followed.

SUMMARY OF ARGUMENT

The Bankruptcy Code excludes from discharge certain categories of debts, including those arising from a debtor's willful and malicious injury to another. The instant case presents a Debtor who has been found to have violated the National Labor Relations Act, a federal statute, by discharging employees so as to avoid a bargaining unit that would be represented by a union. That is to say, the Debtor committed an intentional act that caused a deprivation of individual statutory rights. In the course of reaching that finding, the NLRB discredited the Debtor and rejected various claims by the Debtor that his actions were the product of legitimate business reasons, and concluded that the actions occurred for unlawful, anti-union reasons. These findings should easily establish the malice required under 11 U.S.C. § 523(a)(6) of the Code and the Debtor should have been collaterally estopped from asserting any other facts or reasons.

Following this Court's construction of malice, a plaintiff must show that the debtor has acted "in conscious disregard of [his] duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *First Weber Grp., Inc. v. Horsfall*, 738 F.3d at 775 (quoting *In re Thirtyacre,* 36 F.3d at 700) (emphasis added). As such, a finding of *why* Calvert discharged his employees is essential to determining whether he was justified or privileged in his actions, i.e. whether his actions were "malicious." The bankruptcy court credited Calvert's most recent excuse presented at the bankruptcy hearing for why he laid off his employees, and

found insufficient evidence to establish that Calvert acted with the requisite *malice* under § 523(a)(6). The district court followed.

The NLRB's prior determination of liability in the unfair labor practice proceeding, just like the bankruptcy court's determination of malice, also required a determination as to *why* Calvert discharged his employees. Consequently, Calvert's motive for discharging his employees has already been adjudicated by the ALJ and the NLRB. In finding that Calvert harbored an unlawful motive for his actions, the ALJ weighed the evidence presented at trial, made credibility determinations, and rejected the various nondiscriminatory excuses Calvert proffered as pretext. Adopting the ALJ's findings, the NLRB concluded that Calvert, acting on his antiunion animus, intentionally and unlawfully discriminated against his employees in violation of Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3). That is to say, the NLRB explicitly found that Calvert had acted without just cause or excuse.

The bankruptcy court and district court erred in failing to give proper collateral estoppel effect to the facts and issues adjudicated in the NLRB's unfair labor practice proceedings. Moreover, the courts below failed to adhere to the proper test for "malice" by demanding evidence that Calvert intended to harm his employees when he discharged them. Because the critical issue – whether Calvert acted unlawfully, i.e. with just cause or excuse, when he terminated his employees – (1) is the same issue litigated in the underlying unfair labor practice hearing, (2) was actually litigated, (3) was essential to the judgment, and (4) Calvert was represented during the unfair labor practice proceedings, Calvert should have been

precluded from relitigating the reason for discharging his employees. Calvert acted "in conscious disregard of [his] duties or without just cause of excuse" when he terminated his employees, and his debt should be deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

ARGUMENT

The Bankruptcy and District Courts Erred as a Matter of Law, in Their Finding that Calvert Lacked the Requisite Malice for Nondischargeability Under 11 U.S.C. § 523(a)(6)

This Court, like the district court, reviews the bankruptcy court's findings of fact for clear error and conclusions of law de novo. However, whether the issue of malice was litigated and resolved in a prior action, as required for application of collateral estoppel, is a question of law and reviewed de novo. *In re Davis*, 638 F.3d 549, 553 (7th Cir. 2011); *E.B. Harper & Co., Inc. v. Nortek, Inc.,* 104 F.3d 913, 922 (7th Cir.1997).

A. Legal Principles

1. Exception to discharge under Section 523(a)(6) of the Bankruptcy Code

The Bankruptcy Code provides for the discharge of debts in order "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915); *see also Village of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir. 2002).

However, the courts have been quick to make clear that this opportunity for a fresh start is available only to "the honest but unfortunate debtor." *Grogan v.*

Garner, 498 U.S. 279, 286-87 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). Thus, "the statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts." *Grogan v. Garner*, 498 U.S. at 287. In particular, as stated above, Section 523(a)(6) of the Bankruptcy Code excepts from discharge debts for "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). This Court has noted that courts have found different ways to analyze this terminology, but that "all courts would agree that a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act." *Jendusa-Nicolai v. Larson*, 677 F.3d 320, 323 (7th Cir. 2012). Bankruptcy courts in this circuit have "focused on three points: (1) an injury caused by the debtor (2) willfully and (3) maliciously." *Horsfall*, 738 F.3d at 774. And, this Court has noted, "[a]s with all exceptions to discharge, the burden is on the creditor to establish these facts by a preponderance of the evidence." *Id.*

The sole issue in this appeal is the element of maliciousness.[10] Maliciousness requires that the debtor have acted "in conscious disregard of [his] duties or *without just cause or excuse*; it does not require ill-will or specific intent to do harm." *Horsfall*, 738 F.3d at 774 (quoting *In re Thirtyacre,* 36 F.3d at 700)(emphasis added). Maliciousness can be shown by evidence that the relevant injury resulted

[10] The bankruptcy court found that the NLRB has established that Calvert's actions caused an injury and that Calvert acted willfully. [Appx. Ex. 10, p. 14, ¶¶ 12, 13].

from debtor acting in violation of individual rights. *See, e.g.*, *In re Goldberg*, 487 B.R. 112 (Bankr. E.D. N.Y. 2013).[11]

2. Principles of collateral estoppel apply both to administrative proceedings and to adversary proceedings in bankruptcy

The doctrine of collateral estoppel, or issue preclusion, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). A litigant is estopped from relitigating factual or legal issues that were determined in a prior proceeding, provided that: (1) the issue sought to be precluded is the same as that involved in the prior litigation, (2) the issue was actually litigated, (3) the determination of the issue was essential to the final judgment, and (4) the party against whom estoppel is invoked was fully represented in the prior action. *Matrix IV, Inc. Am. Nat'l Bank & Trust Co.,* 649 F.3d 539, 547 (7th Cir. 2011) (citing *H–D Mich., Inc. v. Top Quality Serv., Inc.,* 496 F.3d 755, 760 (7th Cir. 2007)); *Brandt Indus., Ltd. v. Pitonyak Mach. Corp.,* No. 1:10-CV-0857-TWP-DML, 2012 WL 3257886, at *5-6 (S.D. Ind. 2012).

Administrative proceedings, such as unfair labor practice hearings conducted by the NLRB, are entitled to collateral estoppel effect. *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991). More precisely, courts give preclusive effect to findings of an administrative agency acting in a judicial capacity for resolving disputed issues properly before it where parties have had an adequate opportunity to litigate. *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394,

[11] The Second Circuit applies the same definition of malice. *Horsfall,* 738 F.3d at 775.

422 (1966); *Alvear–Velez v. Mukasey,* 540 F.3d 672, 677 (7th Cir. 2008)); *see also Hamdan v. Gonzales,* 425 F.3d 1051, 1059 (7th Cir. 2005) (*"Res judicata* applies to administrative proceedings . . . ."). Further, collateral estoppel principles apply in nondischargeability proceedings under § 523(a) of the Bankruptcy Code. *Grogan v. Garner*, 498 U.S. at 284 n. 11 (1991); *In re Fogerty,* 204 B.R. 956, 959 (Bankr. N.D. Ill. 1996) (debtor bound by prior judgment).

B. The Bankruptcy and District Courts Erred by Failing to Give Preclusive Effect to the NLRB's finding that Calvert Acted with the Requisite Malice

1. The NLRB proceeding is entitled to be given preclusive effect

The NLRB's finding regarding Calvert's reasons for discharging his employees is entitled to preclusive effect. The issue of malice, as described by the Seventh Circuit, as "without just cause or excuse", H*orsfall*, 738 F.3d at 775 (quoting *In re Thirtyacre,* 36 F.3d at 700), is (1) the same issue as that involved in the NLRB's administrative proceeding, (2) was actually litigated in that proceeding and (3) was essential to the NLRB's determination that Calvert violated Section 8(a)(3) of the Act by discharging his employees. With respect to the fourth factor of collateral estoppel, it is irrefutable that Calvert was fully represented throughout the proceedings establishing that the 16 employees were unlawfully discharged. [Appx. Ex. 7, p. 1204].[12] Though the first three factors are fundamentally interrelated, they are also clearly established.

[12] By Calvert's own admission, he "vigorously denied and disputed allegations of unfair labor practices" alleged at the NLRB hearing and "appealed every decision . . .by [the ALJ]." [Appx. Ex. 2, p. 4, ¶ 8]. Further, Calvert's company, ELC, was represented by Michael L. Einterz, Esq. during those proceedings. [Appx. Ex. 7, p. 1204].

In resolving the question of whether employees were unlawfully discharged in violation of the Act, the NLRB applies the burden-shifting analysis described in *NLRB v. Wright Line a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see also Huck Store Fixture Co. v. NLRB,* 327 F.3d 528, 533 (7th Cir. 2003).[13] To establish unlawful discrimination under Section 8(a)(1) and (3) of the Act, the NLRB's General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected concerted activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 n.7 (1983); *Wright Line*, *supra.* Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. In this step, the employer's burden is to establish a legitimate cause or excuse for its actions.[14] In reaching its legal conclusions, the

[13] *Wright Line* analysis is predicated on the analytic framework set forth in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

[14] *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 401 ("[T]he Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivations[.]").

NLRB properly weighs the credibility of the employer's explanations for discharging its employees. *NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 358 (7th Cir. 1998).

The NLRB established the first factor of the collateral estoppel analysis. Malice, the issue for which collateral estoppel application is being sought here, is the same issue both factually and legally, as that litigated in the NLRB's unfair labor practice proceeding. This is because the NLRB's determination of liability in the unfair labor practice proceeding, just like the bankruptcy court's determination of malice in the bankruptcy proceeding, required and was based upon an answer to the same question: Why did Calvert discharge his employees, or, what was his intent in doing so? Whether Calvert's actions were taken without just cause or excuse for purposes of malice as defined by this Court in *Horsfall*, is precisely the same issue litigated before the NLRB, which found that as a factual matter, Calvert's actions were taken because of his antiunion animus, and were thus for an unlawful discriminatory reason and without just cause or excuse.

The second factor of the collateral estoppel analysis is also established: the issue was actually litigated. The ALJ conducted a five day evidentiary hearing, where Calvert himself testified and proffered three non-discriminatory business reasons (albeit "shifting" and patently rejected) for discharging ELC's employees. Following the hearing, submission of post-hearing briefs and a decision by the ALJ, the NLRB, after applying the *Wright Line* analysis outlined above, found that Calvert waged an illegal antiunion campaign that unlawfully interfered with his employees' statutory rights. ELC, a corporation over which Calvert had total control, first

discharged three members of the union organizing committee, then discharged the remainder of its workforce, consisting of 13 employees, without a legitimate business reason and, in fact, to "avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees." [Appx. Ex. 7, p. 1219]. The decision to unlawfully discharge 13 of the 16 employees was solely Calvert's. [Appx. Ex. 7, p. 1219]. Based on these findings, the NLRB determined that Calvert discharged these employees because they had engaged in statutorily protected conduct and to discourage them from engaging in further such protected conduct in violation of § 8(a)(3) of the Act. [Appx. Ex. 7, p. 1219]. Clearly then, the issue of malice as defined by this Court, "in conscious disregard of one's duties or without just cause or excuse", was actually and fully litigated in the unfair labor practice proceeding.

Finally, the third factor of the collateral estoppel analysis was satisfied, because the NLRB's finding that Calvert discharged his employees solely because of his antiunion animus and to deprive the employees of their statutory rights was essential to the determination in NLRB Order I that Calvert acted without just cause and violated Section 8(a)(3) of the Act. *See, e.g., Van Vlerah Mech. v. NLRB*, 130 F.3d 1258, 1263 (7th Cir. 1997) (determination as to the employer's motivation is necessary to find a violation of § 8(a)(3) of the Act); *Chinese Daily News,* 353 NLRB 613, 623 (2008) (in determining whether an employer's conduct violates § 8(a)(3), "discriminatory intent must be shown").

Having satisfied all four factors of collateral estoppel, the NLRB's findings should have been given preclusive effect with regard to the issue of malice by the bankruptcy and the district courts. This Court held in *Horsfall*, that the bankruptcy and district courts erred when analyzing maliciousness under § 523(a)(6) by failing to give collateral estoppel effect to a state court judgment of tortious interference with a contract. *Horsfall*, 738 F.3d at 775. The Court reasoned that the state-law claim required a finding that the debtor was "not justified or privileged to interfere" with plaintiff's contractual rights; therefore, it had made the requisite findings that debtor's actions were "intentional" and that he was "neither justified nor privileged" to engage in those acts. *Id*. Thus, it was clear in the state court findings that the debtor's actions were neither reasonable nor taken in good faith, and given that the state court judgment substantially mirrored the federal test for maliciousness, the Court found it appropriate to hold debtor to that finding. *Id.*

Likewise, here the NLRB made the requisite findings that the debtor's actions were not only intentional but that he was neither justified nor privileged to engage in those acts. That is to say, it has already been judicially determined that Calvert terminated his employees unlawfully – to deprive them of their rights under the Act – and without just cause. Therefore, the malice element of § 523(a)(6), as defined by this Court definition – "in conscious disregard of one's duties or without just cause or excuse" – was established in the prior unfair labor practice proceeding and Calvert should not have been afforded the opportunity to relitigate that issue. *See Haber v. Biomet, Inc.*, 578 F.3d 553, 557 (7th Cir. 2009) ("issue preclusion ensur[es]

that parties who have fully and fairly litigated a particular issue […] do not receive more than one bite at the apple"); *See also In re Corey*, 583 F.3d 1249, 1251 (10th Cir. 2009) ("it is not unfair to deny a litigant a second bite at the apple, and preclusion conserves resources and provides consistency in judicial decisions").[15]

Indeed, there is an irresolvable conflict between the courts' finding that Calvert acted without the requisite malice and the prior adjudication of unlawful discrimination. As noted in *In re Goldberg*, where a bankruptcy court found a state court judgment for pregnancy discrimination precluded relitigation of malice:

> It would defy logic to find that an overt act constituting disparate treatment discrimination, that is, discrimination aimed at an individual, could occur absent a malicious intent to harm. To hold otherwise would sanction the view that there exists some "just cause or excuse" for discrimination.

487 B.R. at 129. Similarly, it would defy logic to suggest that where, as here, it has already been judicially determined that Calvert intentionally and unlawfully discriminated against and injured his employees for exercising their federal statutory rights, that his conduct had some just cause or excuse; particularly given

[15] As noted above, at pp. 8-9, during the administrative proceeding the ALJ considered and rejected the three non-discriminatory business reasons (or excuses) proffered by Calvert for having discharged his employees. The bankruptcy court disregarded these findings and credited Calvert's new purported reason for discharging the subject employees, an argument asserted for the first time at the bankruptcy hearing more than twelve years after the fact, as "uncontroverted" evidence. (district court quoting bankruptcy court decision that Calvert's testimony for business justification was uncontroverted) [Appx. Ex. 10, p. 15]. To the contrary, the entire underlying unfair labor practice proceeding controverts Calvert's newly presented excuse. By accepting Calvert's new excuse as "uncontroverted," the court disregarded substantial evidence that would require a contrary conclusion. See *Soria v. Ozinga Bros., Inc*., 704 F.2d 990, 999 (7th Cir.1983) (district court erred in disregarding evidence of discrimination in a Title VII suit).

that Calvert's proffered nondiscriminatory reasons for his conduct had already been considered and rejected in that proceeding. *Id.* ("[d]ebtor, whose proffered non-discriminatory reason for his conduct was rejected [in a prior judgment], [cannot] be deemed to have acted without the taint of unlawful discriminatory animus"). To accept, as the bankruptcy court did, Calvert's newly contrived excuse for laying off his employees–to save money by avoiding costly wage audits–effectively endorses the idea that acting in one's financial interests provides just cause or excuse for unlawful discrimination.

The bankruptcy and district courts both properly recognized the preclusive effect of specific findings of fact by the NLRB's ALJ "with respect to [debtor's] intent as to [his] employees." [Appx. Ex. 4, p. 5; Appx. Ex. 13, p. 13]. The courts erred, however, by failing to apply this principle to the ALJ's factual findings that Calvert discharged his employees, not for a legitimate business reason, but for an unlawful one, and that he lacked just cause in doing so. Because the central issue in the administrative proceeding was the same as that in the bankruptcy matter, was actually litigated, was essential to NLRB Order I, and Calvert was fully represented during that proceeding, the courts erred as a matter of law by not holding that the NLRB's findings estopped Calvert from relitigating the issue of malice.

2. The bankruptcy and district courts erred when they applied an incorrect legal test for malice

The district court affirmed the bankruptcy court's finding that anti-union animus, as a motive for discharging employees, could not by itself support a finding of malice and further endorsed the bankruptcy court's finding that the NLRB must

show actual intent to harm. [Appx. Ex. 13, p. 13]. In describing (and quoting from) the bankruptcy court's denial of the Board's motion for summary judgment, the district court observed:

> [T]he Bankruptcy Court's review of the underlying labor proceedings revealed that the only finding of fact made by the ALJ with regard to Calvert's intent was that Calvert acted out of "antiunion animus" in discharging the employees. Id. at 5–6. Because this finding of antiunion animus, alone, was insufficient to establish maliciousness under § 523(a)(6), the Bankruptcy Court denied the NLRB's motion for summary judgment and stated that it would "analyze whether the facts proven at trial, particularly with respect to the intent of Calvert to harm the subject employees, will support a conclusion of nondischargeability."

[Appx. Ex. 13, p. 13 (citing Appx. Ex. 4 at p. 6)].

The district court further described how the bankruptcy court extended this same rationale to its final judgment and accepted Calvert's newly proffered reason for discharging his employees over the Board's findings during the unfair labor practice proceedings:

> Weighing the NLRB's finding of antiunion animus (which the Bankruptcy Court had already stated could not by itself establish malice) against this newly-developed evidence regarding Calvert's motives and knowledge, the Bankruptcy Court held:
>
> > The NLRB did not present evidence from which the Court can conclude that, at the time the decision was made, it was more likely than not that Calvert consciously disregarded the organization rights of the Company's employees when Calvert presented uncontroverted evidence of a legitimate business reason for the layoffs/promotions.

[Appx. Ex. 13, p. 14]. Based on the foregoing, the district court found "no indication that the Bankruptcy Court discarded the NLRB's finding of antiunion animus in weighing the evidence . . ." [*Id.*, p. 13]. Construing the question of malicious intent

as one of fact, the district court reviewed the bankruptcy court's determination for clear error,[16] and affirmed.

Contrary to the courts' determination, and as established above, the NLRB's finding that the discharges were based on antiunion animus itself establishes malice. Congress has prohibited employers from taking adverse employment actions against an employee in order to discourage union activities. Consequently, where antiunion animus is a "substantial or motivating factor" in the employer's decision to take adverse action against the employees, that employer has discriminated against his employees in violation of Section 8(a)(3) of Act. *Huck Store Fixture Co.* 327 F.3d at 533; *see also Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 876 (7th Cir. 2016). Accordingly, the NLRB's finding that a debtor took an adverse employment action against his employee based on antiunion animus establishes an intentional act that is taken without cause or excuse–which is what this Court requires for establishing malice. *See Horsfall*, 738 F.3d at 775 (the requisite findings for establishing malice are that debtor's actions were "intentional" and that he was "neither justified nor privileged" to engage in those acts). In finding that a debtor's motivation of antiunion animus could not by itself establish malice under Section 523(a)(6), and instead requiring the NLRB to establish Calvert's specific

[16] The district court affirmed the bankruptcy court's determination that antiunion animus may not establish malice under § 523(a)(6) and, therefore, reviewed the Bankruptcy Court's findings relevant to the Calvert's intent for clear error. However, as noted above, whether or not malicious intent was resolved by the unfair labor practice litigation is a question of law and reviewed de novo. *In re Davis*, 638 F.3d at 553.

intent to harm his employees, the district and bankruptcy courts erred as a matter of law.

CONCLUSION

For the foregoing reasons, the NLRB respectfully requests that the Court reverse the decision of the district and bankruptcy courts, find that the NLRB established the third element of "malice" pursuant to this Circuit's precedent, and determine that the Debtor's debt to the NLRB be deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

Respectfully submitted,

NATIONAL LABOR RELATIONS BOARD

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Dated at Washington, DC
this 10th day of July, 2017

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. 17-1895**
	)	
EDWARD L. CALVERT,	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 10, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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CERTIFICATE OF COMPLIANCE

I certify that the attorneys whose names appear on this brief are employed by the United States government. I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), containing 8032 words, and the word processing system used was Microsoft Word 2010. I further certify that the text of the electronic brief is identical to the text in the paper copies. I affirm that all of the materials required by Circuit Rule 30(a) and (b) are included in the appendix.

/s/ William R. Warwick, III

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
vs.	)	**No. 17-1895**
EDWARD L. CALVERT,	)	
Appellee.	)	

SHORT APPENDIX TO BRIEF IN SUPPORT OF NATIONAL LABOR RELATIONS BOARD'S APPEAL

Appellant, the National Labor Relations Board, pursuant to Circuit Rule 30, here files this SHORT APPENDIX to its brief and the undersigned to this brief certifies that all of the materials required by Circuit Rule 30(a) are included.

CONTENTS OF SHORT APPENDIX

Appendix Ex. No.	Document Description	Docket Location
10	Bankruptcy Court's Findings of Fact and Conclusions of Law; filed on 12/21/2015.	Bankr. Dckt. 56
11	Bankruptcy Court's Judgment Order; filed on 12/21/2015.	Bankr. Dckt. 57
13	District Court's Order on Bankruptcy Appeal; filed on 3/31/2017.	Dist. Ct. Dckt. 14
14	District Court's Judgment; filed on 3/31/2017.	Dist. Ct. Dckt. 15

SO ORDERED: December 21, 2015

James M. Carr
James M. Carr
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
EDWARD LEE CALVERT,	)	Case No. 13-13079-JMC-7A
	)	
Debtor.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 15-50001
	)	
EDWARD LEE CALVERT,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court for a bench trial on September 23, 2015. Plaintiff National Labor Relations Board ("NLRB") appeared by counsel William R. Warwick, III and Dalford Dean Owens, Jr. Defendant Edward Lee Calvert ("Calvert") appeared *pro se*.

The Court, having reviewed the evidence presented at trial, the *Joint Stipulation of Facts* filed by Calvert and the NLRB on September 16, 2015 (Docket No. 46), the *Pre-Trial Brief of the National Labor Relations Board* filed on September 17, 2015 (Docket No. 47) (the "NLRB's Trial Brief"), the *Pre-Trial Brief of Defendant, Edward Lee Calvert, Pro Se* filed on September 18, 2015 (Docket No. 49), and the other matters of record in this adversary proceeding; having heard the presentations at trial; and being otherwise duly advised, now enters the following findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052, consistent with its statements on the record at the conclusion of the trial.

Findings of Fact

Calvert and the NLRB have jointly stipulated to the following facts:[1]

1. On July 29, 2005 the National Labor Relations Board issued a Decision and Order reported at *E.L.C. Elec., Inc.*, 344 NLRB 1200 (2005).

2. On September 28, 2006 the National Labor Relations Board issued a Decision and Order reported at *E.L.C. Elec., Inc.*, 348 NLRB 301 (2006).

3. On November 8, 2008 the National Labor Relations Board issued a Decision and Order reported at *E.L.C. Elec., Inc., & Its Alter Ego &/or Successor Midwest Elec. & Retail Contractors, Inc., d/b/a MERC, Inc., & Asset Mgmt. Partners, Inc., A Single Integrated Enter. & Single Employer, & Edward L. Calvert, Individually*, 359 NLRB No. 20 (Nov. 8, 2012).

4. On June 20, 2013, the Seventh Circuit issued a judgment, which it amended on July 23, 2013, enforcing the NLRB's 2012 order, in case *National Labor Relations Board v. E.L.C. Electric, Inc., et al.* 7th Cir. No. 13-1952.

[1] Except where noted by brackets, these stipulated facts (findings 1 through 9) are included verbatim, with no adjustment to account for typographical errors or terms defined elsewhere herein.

5. On January 28, 2014, in connection with this bankruptcy [case], Edward Calvert testified at the first creditor meeting.

6. On April 24, 2014, in connection with this bankruptcy [case], and pursuant to Rule 2004, Edward Calvert was deposed by an attorney of the of the National Labor Relations Board.

7. On August 14, 2014, in connection with this bankruptcy [case], and pursuant to Rule 2004, Edward Calvert was deposed by an attorney of the of the National Labor Relations Board.

8. On December 9, 2014, in connection with this bankruptcy [case], and pursuant to Rule 2004, Edward Calvert was deposed by an attorney of the of the National Labor Relations Board.

9. On November 19, 2012, in relation to a prejudgment writ of garnishment proceeding in United States District Court for the Southern District of Indiana, Edward Calvert was deposed by an attorney of the National Labor Relations Board.

The Court makes the following additional findings of fact:

10. On August or September 26, 2002,[2] an election (the "Election") was held in a unit of electricians employed by E.L.C. Electric, Inc. (the "Company"), of which Calvert was owner and president.

a. Prior to the Election, Calvert knew that certain employees of the Company were trying to organize.

[2] The testimony of Calvert (elicited by leading question) and the July 29, 2005 decision of the NLRB set forth different dates for the conduct of the Election.

b. Prior to the Election, Calvert knew a bargaining unit would be delineated, encompassing the employees of the Company who would be eligible to vote in the Election. Calvert knew that supervisors and temporary employees could not vote in the Election.

c. Prior to the Election, Calvert campaigned against the union, which he understood was his right, because he wanted the Company to be union-free. Calvert sent at least two letters to Company employees explaining why he wanted the Company to remain union-free.

d. At the time of the Election, Calvert knew that federal law gave the employees the right to try to organize a union at the Company.

11. The union lost the Election.

12. The union filed objections to the Election. Pursuant to the charges filed by the union, the NLRB issued a complaint alleging that the Company had violated § 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"). On April 7, 2004, the administrative law judge (the "ALJ") issued a decision that the Company had violated § 8(a)(1) and (3) of the NLRA. On July 29, 2005, the NLRB affirmed the ALJ's rulings, findings and conclusions as modified, adopted the recommended Order as modified, and adopted the ALJ's recommendation that the Election be set aside and a new election held.

a. Calvert understood that some of the employees who had left the Company based on the Company's violations of the NLRA and were then working for union contractors would be included in the bargaining unit for the second election.

13. Other remedies were also ordered, including back pay awards, with respect to the Company's violations of the NLRA. By Supplemental Decision and Order dated November 8, 2012, the NLRB affirmed the ALJ's December 20, 2011 rulings, findings and conclusions, adopted the recommended order, and ordered the Company, its alter ego and successor Midwest

Electric & Retail Contractors, Inc., d/b/a MERC, Inc., its alter ego, Asset Management Partners, Inc., and Calvert, their officers, agents, successors and assigns, to pay $437,427 plus interest to 16 individuals, an amount that was stipulated to by Calvert.

14. On or about March 14, 2003, well before the NLRB's decision to set aside the Election and hold a new election but apparently after the NLRB issued on December 23, 2002 a report on challenged ballots and objections, order consolidating cases, order directing hearing, and notice of hearing, the Company promoted some employees in the bargaining unit to management positions and laid off 13 employees in the bargaining unit. (Three employees had been laid off earlier in 2003.) The Company offered to assist the laid-off employees with transitioning to a labor provider.

a. Calvert understood, by virtue of the layoffs, that the Company no longer had certain obligations with respect to the former employees, such as the Company was not obligated to pay them or provide various benefits such as health insurance, vacation pay, holiday pay, or 401(k) matching contributions if available.

b. Calvert understood, by virtue of the layoffs, that the Company had no "rank-and-file" employees who could form a bargaining unit to organize a union.

c. When asked if Calvert believed there would be a union going forward, he answered that he did not know.

15. Calvert testified that the Company laid off the employees to save money associated with common wage project audits.

a. At the time, the Company was working on several common wage (also called prevailing wage) projects such as schools and hospitals. At some point, it seemed to Calvert that the Indiana Department of Labor was auditing the Company on each such project.

The audit process cost the Company money and manpower and would "inevitably" (according to Calvert) find a problem, such as the Company did not pay the right wage rates or benefits because the employees were wrongly classified by job type. Because of this difficulty, the Company chose to use temporary help through labor providers.

b. Under this new model, the Company would negotiate a rate with the labor provider which would include wages, benefits, state and federal taxes, insurance, etc., and the labor provider, not the Company, would be responsible for the Indiana Department of Labor audit on any future common wage project. According to Calvert, this decision "saved the company a ton of money."

c. The Company sent a letter dated March 7, 2003 explaining the transition to each of the Company's employees.

d. The NLRB presented no evidence to contradict Calvert's testimony.

16. On at least two occasions during the trial, counsel for the NLRB, on its direct examination of Calvert, affirmatively declined to question Calvert's intent:

> I want to move ahead now to the spring of 2003 and I'm going to ask you some questions about the lay-off of employees. And I want to be clear, **I'm not asking you why you did it**. I just want to get some facts into the record about what happened. Transcript, 33:9-13 (emphasis added).

> Mr. Calvert, that actually didn't answer my question. **My question was not what your mindset was**. It was, at the time that you eliminate all of these bargaining unit employees, there was not a possibility there could be a union election -- . Transcript, 37:2-5 (emphasis added).

17. The only exchange on the NLRB's direct examination of Calvert regarding intent was as follows:

> Q So at the time you laid all these employees off, you thought there would not -- there would no longer be a union election.
>
> A I didn't have that in my mind.

THE COURT: Say that again, sir. What did you just say?

THE WITNESS: I said I did not have that in my mind.

THE COURT: Did not have that in your mind.

THE WITNESS: No.

Q Mr. Calvert, that actually didn't answer my question. My question was not what your mindset was. It was, at the time that you eliminate all of these bargaining unit employees, there was not a possibility there could be a union election --

A I'd say probably no.

Q -- because that was your belief.

A It wasn't my belief.

Q I know you're not -- no. Well --

A Are you asking me for my belief?

Q Yeah.

A I didn't say that was my belief. I just said I didn't lay them off for that reason. You're trying to get my belief to say that that's why I laid the people off, because so I wouldn't have a union. That was not my intent.

Q But you did transfer 13 employees to temporary --

A No, sir. I did not transfer them.

Q But you laid them off.

A I laid them off.

Q And you promoted the employees you retained to supervisor.

A Whatever the record says, I don't remember at this time exactly who even I promoted or why they were promoted. But it was probably a combination of my thoughts, Kevin Passman's thoughts of who to keep and who not to keep.

Q Okay.

THE COURT: Kevin Passman -- how do we spell that name?

THE WITNESS: P-A-S-S-M-A-N.

THE COURT: P-A-S-S --

THE WITNESS: -S-S-M-A-N.

THE COURT: -- M-A -- Passman?

THE WITNESS: Yeah. He was the vice president of ELC Electric, that had been --

THE COURT: All right.

THE WITNESS: -- with me some 20-some years.

THE COURT: All right.

Q So you didn't believe there would be a union election going forward, not that, that was your motivation. Now, please, to be clear, you did not believe there would be a union going forward.

A I didn't know.

Q But you knew you had no bargaining unit employees.

A Some time, I may have hired somebody else.

Q But at that time, you had no bargaining unit employees.

A At that time, when I laid everybody off, I did not have anyone that would fit the description of a bargaining employee.

Q Okay. Thank you, Mr. Calvert. …

Transcript, 36:17-38:23.

18. A second election was not held.

19. On or about December 17, 2004, Debtor signed a letter to the Company's employees outlining changes to its benefit programs effective January 1, 2005. The letter cited the Company's "difficult financial times" as a justification, including "harassment from the IBEW union and their counterparts the NLRB".

20. On or about March 25, 2006, the Company closed.

21. On December 19, 2013 (the "Petition Date"), Calvert filed a voluntary petition under chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code"),[3] his schedules and statement of financial affairs.

22. Of the $300,247.26 scheduled as the total value of Calvert's personal property, $274,000 was accounts receivable with the account debtor being Calvert's son, Kevin Calvert ("Kevin"). Calvert testified that $274,000 represents one-half of the amount he and his wife loaned to Kevin, and that Kevin owed another $274,000 to Calvert's wife.

a. Calvert and/or his wife loaned Kevin more than $548,000[4] during 2008, 2009 and 2010. Calvert testified at trial that he and his wife loaned Kevin money starting in 2006 when Kevin was without a job and running through 2010 or 2011. Calvert testified that there were or should have been promissory notes for each loan showing the amount of the loan, the date of the loan, and the terms of the loan, signed by Kevin and him, but that the folder he kept of the original promissory notes was lost.

b. This trial testimony contradicted three different amounts – approximately $340,000 between January 1, 2009 and August 12, 2012, $376,000, and $318,658 – that Calvert testified he and his wife loaned to Kevin during an August 14, 2004 deposition.

c. Calvert has not produced the signed promissory notes to the chapter 7 trustee of Calvert's bankruptcy estate (the "Trustee") or the NLRB. Calvert printed from his computer copies (unsigned) of the notes and gave them to the NLRB and/or Trustee.

---

[3] All statutory references hereinafter are to the Bankruptcy Code unless otherwise noted.

[4] Calvert testified that a portion of this amount is attributable to Calvert and/or his wife reimbursing Kevin for health insurance that Kevin provided for Calvert and his wife.

d. On February 13, 2015, Trustee initiated an adversary proceeding captioned *Petr v. Calvert*, Adversary Proceeding No. 15-50034, against Kevin seeking a judgment of more than $548,000 plus interest relating to Calvert's loans to Kevin, which Trustee alleged, among other things, were fraudulent transfers. Trustee's allegations were resolved via a settlement that the Court approved on July 6, 2015 (Bankruptcy Case Docket No. 157). Pursuant to the terms of the settlement, Kevin will pay $150,000 to Calvert's bankruptcy estate over the course of two years. In the event of a default in payment, Trustee would submit to the Court an Agreed Judgment in the amount of $300,000. Trustee represented to the Court that he believes, (a) "that the proposed settlement is fair and equitable under the circumstances by avoiding uncertain, lengthy and costly litigation which, if successful, would be followed by protracted and expensive proceedings to recover any judgment amount against Kevin"; (b) "in the reasonable exercise of his business judgment, that the proposed settlement is in the best interests of the estate and the creditors"; and (c) that the settlement "represents a fair and appropriate compromise in light of the factors and considerations presented." (*See* Bankruptcy Case Docket No. 156, ¶¶ 7, 9, 10.) No party in interest, including the NLRB, filed a timely objection to the settlement motion.

23. On January 28, 2014, at the § 341 first meeting of creditors, Calvert testified that his only income was derived from social security and rental income. His responses to item 1 (income from employment or operation of business) and item 2 (income other than from employment or operation of business) on the statement of financial affairs showed social security, rental income, tax refunds, an IRA distribution, and a loan against a life insurance policy.

a. His 2013 tax return shows business income of $17,072, which Calvert testified was from his consulting activities. Calvert worked, issued invoices and got paid in 2013 and 2014 for consulting work that he performed separate and apart from the listed sources of income.

b. Calvert issued consulting invoices under the name "Express Consulting" but did not list Express Consulting in response to item 18 (nature, location and name of business) on the statement of financial affairs. Calvert further testified that "Express Consulting" was a business his son had incorporated, and Calvert chose the wrong name.

c. Calvert testified that he does not consider the consulting income to be "business" income because he did not formally establish a company with the State of Indiana, e.g., he did not receive a certificate, he was not granted a license, he did not advertise, and he did not have a telephone line, stationery, accounting system, business cards and so forth. Calvert testified at trial that these projects were referred to him by long-time friends.

24. After the NLRB obtained a Court order, Calvert's account at Fifth Third Bank appears to have been garnished. Thereafter, Calvert closed such account and began to use his wife's account (the "Account") at Chase Bank. Calvert's income, including payments for Calvert's consulting work, and his wife's income were then deposited into the Account.

a. On Schedule B, item 2 (checking, savings or other financial accounts …), Calvert did not list his interest in the Account.

b. Calvert testified that the Account was not included because it is his wife's account and she is not part of the bankruptcy case.

25. Calvert received $10,000 on or about December 9, 2013 (10 days prior to the Petition Date) as payment for his consulting services, which was not reflected in the schedules or

statement of financial affairs. Calvert testified that he had spent such money pre-petition to pay bills. Calvert testified at trial that he thought what he had (in terms of assets) on the Petition Date was all that had to be included in the bankruptcy papers.

26. As of September 23, 2015, after applying two involuntary payments against the amounts owed, the outstanding amount of the debt owed by Calvert is $458,249.00 plus excess tax amounts to account for such liability that the individuals to whom the back pay is owed would incur by receiving the back pay and interest in a lump sum.

Conclusions of Law

The Court makes the following conclusions of law:

1. Any finding of fact above will also be a conclusion of law, and any conclusion of law will also be a finding of fact to support the judgment of the Court.

2. This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1334 and 157.

3. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

4. Venue is proper in this matter pursuant to 28 U.S.C. §§ 1408 and 1409.

5. As more fully described in the *Entry on Motion for Summary Judgment* entered September 1, 2015 (Docket No. 39), the claims against Calvert have been liquidated in the NLRB proceedings (with Calvert's and his counsel's participation) and the Court will give preclusive effect to the amount of the debt.

§ 523(a)(6)

6. Exceptions to discharge under § 523 "are to be [construed] strictly against a creditor and liberally in favor of the debtor." *Goldberg Sec., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir. 1992) (quoting *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985)).

"The burden is on the objecting creditor to prove exceptions to discharge." *Id.* (citation omitted). The burden of proof required is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991).

7. A debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is excepted from discharge pursuant to § 523(a)(6). "Bankruptcy courts in [the Seventh Circuit] have focused on three points: (1) an injury caused by the debtor (2) willfully and (3) maliciously." *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013) (citations omitted).

8. Injury "is understood to mean a 'violation of another's legal right, for which the law provides a remedy.' The injury need not have been suffered directly by the creditor asserting the claim. The creditor's claim must, however, derive from the other's injury." *Id.* (internal citations omitted).

9. "Willfulness requires 'a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.' " *Id.* (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (emphasis in original)). " 'Willfulness' can be found either if the 'debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury.' " *Id.* (quotation omitted).

10. Maliciousness requires the debtor to act "in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994) (quotation omitted). The Seventh Circuit reaffirmed its definition of maliciousness from *Thirtyacre* as good law. *Horsfall*, 738 F.3d at 774-75.

11. The NLRB asserted (and has the burden of proving) that "Calvert willfully and maliciously injured his employees when he terminated them for exercising rights guaranteed to

them by the National Labor Relations Act, and thereafter arranged to employ them indirectly, through labor brokers, so that he could avail himself of their skills without having to contend with their exercising their federally protected rights under the National Labor Relations Act." NLRB's Trial Brief, p. 6. Calvert disagrees.

12. With respect to an "injury," it is established, based on Calvert's testimony, that his decision to promote or lay off all of the Company's bargaining-unit employees prevented them from exercising their legal right to organize or not to organize at the Company under the NLRA.

13. Likewise, with respect to "willful," it is established, based on Calvert's testimony, that he understood that there were no bargaining-unit employees who could exercise their legal right to organize or not to organize at the Company once they were laid off or promoted. This is sufficient to establish willfulness as described in *Horsfall* because "[Calvert's] act was substantially certain to result in injury."

14. With regard to maliciousness, the Court is contending with two competing reasons for the layoffs/promotions: (i) the NLRB's position that Calvert acted "in conscious disregard" of the organization rights of the Company's employees; or (ii) Calvert's "just cause or excuse" to save the Company money.

a. Calvert testified that he switched to temporary help from labor providers to avoid costly audits by the Indiana Department of Labor on common wage projects. The NLRB presented no evidence (testimony or documentary) refuting Calvert's testimony (a) that the Company had been audited, (b) that the Company incurred costs responding to those audits, or (c) that the audits revealed issues.

b. The record with respect to what Calvert knew at the time he made the decision to layoff/promote the employees is somewhat unclear. The Election, which the union lost, was conducted during the fall before Calvert made the decision. Calvert apparently knew before he made the decision that the union had challenged the Election. However, Calvert did not know that a second election would be ordered because the ALJ's decision, and the affirmance thereof by the NLRB, were not issued until 2004 and 2005, respectively. Calvert's testimony revealed uncertainty:

> Q So you didn't believe there would be a union election going forward, not that, that was your motivation. Now, please, to be clear, you did not believe there would be a union going forward.
>
> A I didn't know.

(Transcript, 38:13-17). This appears to be substantiated by the fact that the ALJ's and the NLRB's decisions were not issued until more than one year and two years, respectively, thereafter. The NLRB did not present evidence from which the Court can conclude that, at the time the decision was made, it was more likely than not that Calvert consciously disregarded the organization rights of the Company's employees when Calvert presented uncontroverted evidence of a legitimate business reason for the layoffs/promotions.

15. Therefore, because the Court must construe exceptions to discharge strictly against the NLRB and liberally in favor of Calvert, the Court concludes that the NLRB did not prove by a preponderance of the evidence that Calvert acted maliciously. The debt owed by Calvert is NOT excepted from discharge pursuant to § 523(a)(6).

§ 727(a)(3) and (4)

16. Section 727 provides, in relevant part:

(a) The court shall grant the debtor a discharge, unless –

> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account;
> (B) presented or used a false claim;
> (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs; … .

17. "Consistent with the 'fresh start' policy underlying the Code, these [§ 727(a)] exceptions to discharge should be construed strictly against the creditor and liberally in favor of the debtor. It is also important, however, to recognize that a discharge in bankruptcy is a privilege, not a right, and should only inure to the benefit of the honest debtor." *Matter of Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996) (internal citations omitted). "The denial of discharge is a harsh remedy to be reserved for a truly pernicious debtor." *Soft Sheen Prods., Inc. v. Johnson (In re Johnson)*, 98 B.R. 359, 367 (Bankr. N.D. Ill. 1988) (citation omitted). The grounds for denial of discharge under § 727(a) must be established by a preponderance of the evidence. *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966–67 (7th Cir. 1999).

§ 727(a)(3)

18. "The purpose of § 727(a)(3) is 'to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs.' " *Id.* at 969 (quoting *Cox v. Lansdowne (In re Cox)*, 904 F.2d 1399, 1401 (9th Cir. 1990)). As a precondition to discharge, debtors are required to "produce records which provide creditors 'with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy

for a reasonable period past to present.' " *Juzwiak*, 89 F.3d at 427 (quotations omitted). "Records need not be kept in any special manner, nor is there any rigid standard of perfection in record-keeping mandated by § 727(a)(3). On the other hand, courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs." *Id.* at 428 (internal citations omitted). Intent is not a requisite element for denying a discharge under § 727(a)(3). *Scott*, 172 F.3d at 969.

19. With respect to § 727(a)(3), the NLRB's sole focus is Calvert's failure to produce signed promissory notes documenting Calvert's and his wife's loans to Kevin, which are, according to the NLRB, absolutely necessary for it to "figure out exactly how much [Calvert] loaned his son and the precise character of these loans … ." Transcript, 91:16-19. Calvert testified that he lost the folder containing the original promissory notes, but he produced unsigned copies of the promissory notes that he printed from his computer.

20. As noted in Conclusion of Law § 18 above, Calvert's presentation of his financial affairs need not be perfect, but it had to provide enough information so that the NLRB did not have to guess at or reconstruct Calvert's financial affairs itself. Thus, the Court finds itself balancing the competing interests by deciding whether Calvert provided "*enough* information to ascertain the debtor's financial condition and track his financial dealings with *substantial* completeness and accuracy for a *reasonable* period past to present." *Juzwiak*, 89 F.3d at 427 (emphasis added). The following two reasons tip the scale in Calvert's favor:

a. A chapter 7 trustee is charged with investigating the financial affairs of a debtor (§ 704(a)(4)), and Trustee did so in Calvert's bankruptcy case. Trustee conducted a § 341 meeting of creditors, filed a report of possible assets (Bankruptcy Case Docket No. 58), motions to sell (Bankruptcy Case Docket Nos. 69 and 128), and an application to employ an

auctioneer/realtor (Bankruptcy Case Docket No. 117). Trustee initiated an adversary proceeding against Kevin (*see* Finding of Fact ¶ 22(d)) for the purpose of recovering money transferred by Calvert to Kevin, and ultimately settled the adversary proceeding with Kevin agreeing to pay a substantial amount of money to the bankruptcy estate. Trustee represented to the Court that the settlement was fair, equitable and in the best interest of the bankruptcy estate and creditors, and the NLRB did not object to the proposed settlement.

b. Moreover, as the Court addressed at the conclusion of the trial, the Uniform Commercial Code anticipates the loss of negotiable instruments (for example, *see* Ind. Code § 26-1-3.1-309), so the loss of the original promissory notes is not, in and of itself, dispositive.

21. Based on the circumstances of Calvert's bankruptcy case, it appears that, notwithstanding the loss of the original promissory notes, Trustee was able to ascertain Calvert's financial condition or business transactions with Kevin and act thereon. *See Schaumburg Bank & Trust Co., N.A. v. Hartford (In re Hartford)*, 525 B.R. 895, 909 (Bankr. N.D. Ill. 2015) ("the failure [to keep accurate records] appeared to have no bearing on the trustee's ability to administer the bankruptcy case … [t]he trustee was able to conclude the section 341 meeting, issue a report of assets, set a bar date and take other steps to administer the case"]. Therefore, strictly construing the exception to discharge against the NLRB, the Court declines to deny Calvert's discharge pursuant to § 727(a)(3).

§ 727(a)(4)

22. "The purpose of § 727(a)(4) is to enforce the Debtors' duty of disclosure and to ensure that the Debtors provide reliable information to those who have an interest in the

administration of the estate. *Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 359 (Bankr. N.D. Ill. 2002) (citations omitted).

23. In order to prevail, the NLRB must establish five elements: "(1) [Calvert] made a statement under oath; (2) the statement was false; (3) [Calvert] knew the statement was false; (4) [Calvert] made the statement with the intent to deceive; and (5) the statement related materially to the bankruptcy case." *Id.* (citation omitted).

> 24. To find the requisite degree of fraudulent intent, the court must find that the debtor knowingly intended to defraud or engaged in such reckless behavior as to justify a finding of fraud. Direct evidence of intent to defraud may not be available. Instead, intent may be inferred from circumstantial evidence or by inference based on a course of conduct. Reckless disregard means "not caring whether some representation is true or false ... ." If a debtor's bankruptcy schedules reflect a "reckless indifference to the truth" then the plaintiff seeking denial of the discharge need not offer any further evidence of fraud.

Trennepohl v. Neal (In re Neal), 2009 WL 684793 at *2 (Bankr. S.D. Ind. 2009) (internal citations omitted).

25. "[A] fact is material 'if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property.' " *Stamat v. Neary*, 635 F.3d 974, 982 (7th Cir. 2011) (quotation omitted).

26. The NLRB focuses on the omission of three items from Calvert's schedules and/or statement of financial affairs: (a) the Account because it was held in his benefit, (b) a consulting business that he operated prior to the Petition Date, and (c) business income, particularly $10,000 he was paid within ten days or so of the Petition Date; and alleged false testimony at the § 341 meeting of creditors when Calvert testified that his only sources of income were rental income and social security. *See* NLRB's Trial Brief, pp. 8-10. Calvert denies that he had a consulting "business" and argues that the $10,000 spent pre-petition was not an asset on

the Petition Date. With regard to the Account, he did not list it because it is his wife's account and she is not part of his bankruptcy case.

27. The Court concludes that the NLRB has established elements (1), (2), and (5) with respect to each of the three omissions.

28. However, the Court concludes that the NLRB has not established elements (3) and (4) by a preponderance of the evidence.

a. Calvert clearly has, at minimum, an equitable interest in the Account. He used it as his personal bank account even though his name was not on it. The Account should have been scheduled. However, his testimony undercuts the notion that the Account was omitted deceptively, and the NLRB has presented no evidence regarding Calvert's "reckless indifference to the truth" or a course of conduct that allows the Court to draw a different inference based thereon.

b. Calvert's "consulting business" should have been disclosed. The lack of formalities does not change its status as a "business," as sole proprietorships continue to be a valid and recognized business form. Likewise, the $10,000 of income derived from Calvert's consulting business should have been disclosed in addition to the rental income and social security benefits he was receiving. It is irrelevant that the income was inconsistent because it was earned through business-related activities. However, the Court cannot conclude that Calvert had deceptive intent regarding the business or the $10,000 payment. Calvert testified that he did not disclose the consulting business because it was not a "formal" business in his view, and that he did not disclose the $10,000 because it had been spent prior to the Petition Date. The Court concludes that the NLRB did not meet its burden of proof because it presented no direct or circumstantial evidence that allows the Court to draw a different conclusion.

29. The Court acknowledges that a common thread running through the omissions seems to be Calvert's reliance on "formalities" – e.g., his name was not on the Account; his wife was not a joint debtor in the bankruptcy case; he had not formally established a consulting business with the State of Indiana. This common thread is not sufficient to establish a course of conduct that provides circumstantial evidence of Calvert's intent on its own. The Court looked to substantiate this possible course of conduct through Calvert's "reckless indifference" to the truth or a lack of care about whether the schedules and statement of financial affairs were accurate, and it simply could not find substantiating evidence to conclude that Calvert's intent in omitting that information was to deceive.

30. Therefore, because the Court finds that the omissions were not made "knowingly and fraudulently," the Court declines to deny Calvert's discharge pursuant to § 727(a)(4).

Decision

Based on the foregoing, the Court hereby concludes that:

a. Calvert is entitled to a judgment that the debt owed by Calvert to the NLRB is not excepted from discharge pursuant to § 523(a)(6); and

b. Calvert is entitled to a judgment that Calvert's discharge will not be denied pursuant to § 727(a)(3) or (a)(4).

The Court will enter judgment consistent with these findings of fact and conclusions of law contemporaneously herewith.

# # #

SO ORDERED: December 21, 2015.

James M. Carr
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
EDWARD LEE CALVERT,	)	Case No. 13-13079-JMC-7A
	)	
Debtor.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No. 15-50001
	)	
EDWARD LEE CALVERT,	)	
	)	
Defendant.	)	

JUDGMENT

Trial on this matter was held on September 23, 2015. Plaintiff National Labor Relations Board ("NLRB") appeared by counsel William R. Warwick, III and Dalford Dean Owens, Jr.

Defendant Edward Lee Calvert ("Calvert") appeared *pro se*. At the conclusion of the trial, the Court announced its preliminary decision on the record subject to further refinement.

In accordance with the written Findings of Fact and Conclusions of Law entered contemporaneously herewith, it is HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of Calvert and against the NLRB on the allegations of the complaint. The debt owed by Calvert is DISCHARGEABLE, and Calvert's discharge is NOT DENIED pursuant to 11 U.S.C. § 727(a)(3) or (4).

# # #

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
vs.	)	No. 1:16-cv-00161-SEB-MJD
EDWARD LEE CALVERT,	)	
Appellee.	)	

ORDER ON BANKRUPTCY APPEAL

Presently before the Court is an appeal by the National Labor Relations Board ("NLRB") [Docket No. 1], filed on January 20, 2016, challenging the decision of the Bankruptcy Court issued on December 21, 2015. For the reasons detailed below we AFFIRM the Bankruptcy Court's decision.

Factual Background

Debtor-Appellee Edward L. Calvert was the sole owner and president of ELC Electric Inc. (the "Company"), an electrical contracting company operating in the Indianapolis area. In July 2002, the International Brotherhood of Electrical Workers, Local 481 (the "Union") sought to become the certified bargaining representative for the Company's rank-and-file electricians. An election to determine whether a majority of the electricians desired to be represented by the Union was scheduled by the NLRB for September 26, 2002. Prior to election, Calvert became aware that the rank-and-file

electricians were attempting to organize; thus, in anticipation of the upcoming election, Calvert launched a campaign against the Union's certification because he wanted the Company to remain union-free.

On September 26, 2002 the Union lost the election, failing to gain a majority of support from the electricians. Shortly thereafter, the Union filed objections with the NLRB alleging that the Company had engaged in conduct that unduly influenced the election results in violation of the National Labor Relations Act (the "Act"), 29 U.S.C. § 101, *et seq.*

Following the Union's loss in the September 2002 elections, but prior to any decision by the NLRB on the challenges to its results, in January, February, and March of 2003, the Company laid off sixteen of its bargaining-unit electricians and promoted the only two remaining electricians, leaving the Company with no rank-and-file workforce.

Calvert testified that he understood that by laying off the rank-and-file electricians, the Company would no longer have obligations to pay them or provide them with other benefits such as health insurance or retirement contributions. In addition, it was his understanding that the layoffs left the Company with no rank-and-file employees who could form a bargaining unit, but that, at the time he made the decision to lay off the electricians, he did not know whether there would be future attempts to unionize workers at the Company.

He testified further that the Company had laid off the employees to save money. Specifically, at the time of the layoffs, the Company was contracted for several

"prevailing wage projects" such as schools and hospitals for which the Indiana Department of Labor was conducting audits that were costing the Company money and manpower, and which would, according to Calvert, "inevitably" lead to the Department discovering a problem with the Company's payment of wages, provision of benefits, or classification of workers. As a result, the Company chose to shift its operations to the use of temporary workers, whereby the Company would contract with an outside labor provider, who would be responsible for the provision of wages, benefits, and taxes, and, most importantly, would be responsible for any further audits by the Indiana Department of Labor. According to Calvert, this decision "saved the Company a ton of money." Bankr. Dkt. 56 at 6. The Company sent each of the affected workers a letter explaining the decision on March 7, 2003, a week prior to the layoffs.

In response to the early 2003 layoffs, the Union filed additional charges with the NLRB alleging that, by discharging the entire rank-and-file workforce, the Company had unlawfully discriminated against its electricians for engaging in their statutorily-protected right to organize. Pursuant to the charges filed by the Union, the NLRB instituted administrative proceedings against the Company for alleged violations of §§ 8(a)(1) and (3) of the Act. A trial was conducted in Indianapolis before an Administrative Law Judge ("ALJ") appointed by the NLRB, and, on April 7, 2004, the ALJ issued a decision holding that the Company's actions had violated §§ 8(a)(1) and (3) of the Act. On July 29, 2005, the NLRB affirmed the ALJ's rulings, findings, and conclusions as modified,

adopted the recommended order as modified, and adopted the ALJ's recommendation that the September 26, 2002 election be set aside and a new election be held.

In reaching its conclusion that the Company, through unfair labor practices, had interfered with the election results, requiring that they be set aside and a new election be held, the NLRB found that the Company discriminatorily discharged all sixteen of its bargaining-unit employees and that Calvert had personally made the decision to discharge the Company's thirteen electricians on March 14, 2003.[1] The NLRB also found that Calvert's intent in discharging these employees was to thwart their pursuit of union representation, given that he continued to avail himself of their services after their termination by contracting with the labor contractors for whom they worked. The NLRB also noted that it was unpersuaded by Calvert's explanations for the Company's actions, finding instead that Calvert's actions were based on unlawful antiunion animus. The NLRB ordered the Company, its officers, agents, successors, and assignees, to make whole through the payment of backpay the sixteen employees who had been unlawfully discharged in violation of the Act.

On March 25, 2006, nearly eight months after the NLRB ordered the payment of backpay, the Company ceased operations, prompting the NLRB to conduct a subsequent proceeding intended to address who was to become responsible for paying the Company's backpay liability. On November 8, 2012, an ALJ issued a Supplemental

[1] The record does not reflect who made the decision to layoff three of the sixteen bargaining-unit employees in January and February 2003, only that Calvert, as president, made the decision on March 14, 2003 to either promote or layoff the remaining rank-and-file workers.

Decision and Order finding that Calvert had created new corporate identities for the express purpose of avoiding the Company's liability for payment under the NLRB's original order, that the new corporate identities were alter-egos of the Company, and that Calvert had disregarded the separateness of the corporations and comingled and diverted funds in order to "evade his legal obligations to the backpay owed to the 16 discriminatees." Tr. Ex. 4 at 15. The ALJ held that the corporate veil should be pierced and Calvert should be held personally liable for $437,427 in backpay and interest to be paid to the sixteen discharged employees. The Order was modified, affirmed, and enforced by the Seventh Circuit on July 23, 2013. Tr. Ex. 5.

Five months thereafter, on December 19, 2013, Calvert filed a Chapter 7 bankruptcy petition seeking discharge of his debts. In response, the NLRB initiated the present adversary proceeding seeking to have its claim for the unsatisfied payment of backpay adjudicated as nondischargeable pursuant to 11 U.S.C. § 523(a)(6) and to have Calvert deemed ineligible for discharge pursuant to 11 U.S.C. § 727(a)(3) and (4).

On June 5, 2015, the NLRB moved the Bankruptcy Court for entry of summary judgment on grounds that its § 523(a)(6) claim for nondischargeability, which requires a showing of willfulness, deliberate injury, and malice, had been fully adjudicated in the NLRB's unfair labor practice proceedings and therefore the Bankruptcy Court should rely on the findings and conclusions in the NLRB's Decision and Order. The Bankruptcy Court denied the motion on September 1, 2015, holding that "the level of '*mens rea*' required for a determination of nondischargeability is not the same with respect to an

unfair labor practice determination under §8(a) of the National Labor Relations Act." Bank. Dkt. 39 at 4–5. Accordingly, the Bankruptcy Court held that the finding of antiunion animus in the NLRB decision did not necessarily compel a finding that Calvert had the subjective intent required by § 523(a)(6); however, the Bankruptcy Court held that any "specific findings" made by the ALJ with regard to Calvert's intent to cause injury to the electricians were entitled to preclusive effect under the doctrine of collateral estoppel, but upon review of the prior decisions, found that the NLRB adjudications lacked sufficient "specific findings" as to Calvert's intent so as to enable the Bankruptcy Court to give preclusive effect to the to the legal issues of liability and nondischargeability. The Bankruptcy Court held that it would instead analyze whether the facts proven at trial would support a conclusion of nondischargeability under § 523(a)(6) of the Bankruptcy Code.

A trial on the issue of nondischargeability was held on September 23, 2015, after which, on December 21, 2015, the Bankruptcy Court issued its Findings of Fact and Conclusions of Law, holding that, based on the evidence adduced at trial, Calvert's debt to the NLRB was not excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). The Bankruptcy Court concluded: (1) that Calvert's decision to promote or lay off all of the Company's bargaining-unit employees prevented them from exercising their legal rights to organize under the NLRA and therefore caused a cognizable injury under § 523(a)(6); (2) that Calvert understood that there would be no bargaining-unit employees who could exercise their legal right to organize at the Company once they were all either laid off or

promoted and therefore he acted with requisite willfulness under § 523(a)(6); and (3) that Calvert's testimony that the Company switched to temporary employees from labor providers in order to avoid costly audits by the Indiana Department of Labor in confluence with the fact that he made the decision to switch to temporary employees more than a year prior to the ALJ's decision to set aside the first election's results and order a second election sufficiently refuted the NLRB's claim that, at the time the decision to lay off the workforce was made, it was more likely than not that Calvert consciously disregarded the organizational rights of the Company's employees. See Bankr. Dkt. 56 at 14–15, ¶¶ 12–14. Accordingly, construing the exception to discharge strictly against the NLRB and liberally in favor of Calvert, the Bankruptcy Court held that "the NLRB did not prove by a preponderance of evidence that Calvert acted maliciously. The debt owed by Calvert is NOT excepted from discharge pursuant to § 523(a)(6)." *Id.* at ¶ 15.

On January 20, 2016, the NLRB appealed the Bankruptcy Court's decision arguing that the NLRB's determination made in the underlying labor proceedings that Calvert had unlawfully discriminated against the bargaining-unit employees for exercising their statutory rights should be given preclusive effect with regard to the issue of whether Calvert had acted "in conscious disregard of [his] duties or without just cause or excuse." See Dkt. 10 at 9. The appeal became fully briefed on May 2, 2016, and is now ripe for decision by this Court.

Standard of Review

This Court has subject-matter jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a)(1), which provides that "the district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees." Pursuant to Fed. R. Bankr. P. 8013, the District Court may "affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." In reviewing a bankruptcy court's judgment, questions of law are reviewed *de novo* and the bankruptcy court's findings of fact are reviewed for clear error. *In re Salem*, 465 F.3d 767, 773 (7th Cir. 2008).

Discussion

On appeal, the NLRB asks us to hold that the Bankruptcy Court erred in finding that the NLRB failed to prove by a preponderance of evidence that when Defendant-Appellee Calvert terminated his former employees he acted with the requisite malice to establish the nondischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6).

For a debt to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6), it must be the result of a "willful and malicious injury by debtor to another entity or to the property of another entity." The Seventh Circuit has defined "willful and malicious injury" as "one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act." *Jendusa-Nicolia v. Larson*, 677 F.3d 320, 324 (7th Cir. 2012). In analyzing whether a debt fits this description, bankruptcy courts within our Circuit focus on three points: (1) whether an

injury was caused by the debtor; (3) whether the debtor acted willfully; and (3) whether the debtor acted with malice. *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013). Throughout the analysis, the burden remains on the creditor (the NLRB) to establish these facts by a preponderance of evidence. *Id.*

Following a trial on this issue, the Bankruptcy Court found that Calvert's debt of $437,427 in backpay and interest to be paid to the sixteen discharged Company employees was the product of an injury to the employees, caused by Calvert, who acted willfully in causing the injury. See Bankr. Dkt. 56 at 14–15.The Bankruptcy Court declined the find, however, that the NLRB had proven by a preponderance of evidence that Calvert acted with the requisite malice in causing the injury, thereby satisfying the third prong of the § 523(a)(6) analysis and excepting the debt from discharge. *Id.* at ¶ 15.

The NLRB's primary argument on appeal is that the Bankruptcy Court failed to give appropriate preclusive effect to the underlying unfair labor practice proceedings in which the ALJ and NLRB determined that Calvert's company, ELC Electric Inc., had violated § 8(a) of the National Labor Relations Act. See Dkt. 10 at 11–14. At first blush it appears that the NLRB is appealing the Bankruptcy Court's legal conclusion contained within its order on summary judgment [Bankr. Dkt. 39] that, although the material facts presented in a nondischargeability adversary proceeding and an unfair labor practice proceeding may be similar, the level of *mens rea* needed to establish nondischargeability under § 523(a)(6) of the Bankruptcy Code is sufficiently distinct from that needed to prove an unfair labor practice under § 8(a) of the NLRA so as to require the Bankruptcy

Court to conduct its own analysis of dischargeability under § 523(a)(6), notwithstanding a prior determination of liability under § 8(a) of the NLRA. See Bankr. Dkt. 39 at 4–5 (citing *National Labor Relations Board v. Gordon (In re Gordon)*, 303 B.R. 645, 657 (Bankr. D. Colo. 2003)). But if the NLRB's position were truly that its prior determination of liability under the NLRA should be given preclusive effect with regard to the Bankruptcy Court's determination of dischargeability under the Bankruptcy Code, then its claim for collateral estoppel would necessarily call for an analysis of whether: (1) the issue sought to be precluded is the same as that involved in the prior proceeding, (2) the issue was actually litigated in that proceeding, (3) the determination of that issue was essential to the final judgment of the proceeding, and (4) the party against whom the preclusion is invoked was fully represented in the prior proceeding. *Matrix IV, Inc. v. Am. Nat'l Bank & Trust Co.*, 649 F.3d 539, 547 (7th Cir. 2011) (citing *H–D Mich., Inc. v. Top Quality Serv., Inc.*, 496 F.3d 755, 760 (7th Cir. 2007)). Moreover, to determine whether the issues "involved" and "actually litigated" in the prior labor proceedings are the "same" as those at issue in the adversary bankruptcy proceedings, we would need to take a closer look at the underlying unfair labor practice decisions promulgated by the ALJ, NLRB, and Seventh Circuit to determine whether the NLRA analysis conducted in those proceedings "substantially mirrored the federal test for maliciousness " such that it should be given preclusive effect here. *Horsfall*, 738 F.3d at 775.

Yet the NLRB conducts none of the aforementioned analysis. Indeed, rather than discussing the analysis conducted in the underlying unfair labor practice proceedings,

with specific regard to the *mens rea* elements needed to prove a violation of § 8(a) of the NLRA, the NLRB simply makes vague reference to certain "findings" from those proceedings which it views as persuasive in its argument that the debt should be excepted from discharge. See Dkt. 10 at 13. Specifically, the NLRB references (without citation) the Board's findings that Calvert, on behalf of his company, acted out of antiunion animus in intentionally discharging Company employees to avoid future collective bargaining, which was unlawfully discriminatory under the NLRA. *Id.* The NLRB then abruptly concludes:

> The NLRB has found that Calvert terminated his employees unlawfully—to deprive them of their right under the Act—and, *a fortiori*, without just cause. Therefore, the maliciousness of the injury, as reckoned by the Seventh Circuit, is the same issue litigated in the underlying unfair labor practice proceeding.

Id. at 13–14. Again, in order to conclude that a determination of liability under the NLRA is the "same" as a finding of malice under § 523(a)(6) of the Bankruptcy Code for purposes of collateral estoppel, the Court would need to compare the methods of analysis germane to each statute and determine whether the they "substantially mirror" one another. It is the NLRB's burden to make such a showing, *see e.g.*, *Cobin v. Rice*, 823 F. Supp. 1419, 1431 (N.D. Ind. 1993), but the NLRB has failed to do so; indeed, the NLRB has failed to even attempt to meet its burden by engaging in the necessary analysis. "It is the parties' duty to package, present, and support their arguments," *Roger Whitmore's Auto Srv. v. Lake Cnty.*, 424 F.3d 659, 664 n.2 (7th Cir. 2005), and for good reason; for us to embark on an expedition through the records of the underlying labor and bankruptcy

proceedings in order to engage in a collateral estoppel analysis without it having been briefed before us would defeat the adversarial aims of our jurisdiction. Moreover, it would risk striking a severe unfairness to Calvert, the party against whom the NLRB seeks to offensively employ estoppel. As the D.C. Circuit Court of Appeals recognized, "The doctrine is detailed, difficult, and potentially dangerous." *Jack Faucett Assocs. v. AT&T*, 744 F.2d 118, 124 (D.C. Cir. 1984). The effect of its acceptance is, in essence, to close the courthouse doors to a party with regard to a particular claim or issue, which is why the doctrine's use is limited to only those situations where that party has already received a "full and fair" opportunity to litigate its claims, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). An issue carrying such grave consequences requires full analysis by the parties and the court. Because the NLRB has provided us no analysis of the elements of collateral estoppel, nor has it provided with specific citation the materials needed to conduct such an analysis, we are ill-equipped to rule on this issue. Accordingly, we leave undisturbed the Bankruptcy Court's ruling regarding the preclusive effect of the NLRB's determination of liability for violations of the NLRA. See Bankr. Dkt. 39.

Alternatively, the NLRB appears to take the position that, in reaching its conclusion that Calvert did not act with the malice required to except the debt from discharge pursuant to § 523(a)(6), the Bankruptcy Court must have failed to give appropriate weight to the factual findings made in the prior proceedings. See Dkt. 10 at 13 ("the Bankruptcy Court erred here by analyzing the maliciousness of Calvert's

conduct without deference to the administrative record in the prior unfair labor practice proceeding."). It is somewhat unclear what deference the NLRB believes the administrative record is due. In its order on summary judgment, the Bankruptcy Court held that a ruling of liability under the NLRA does not compel a ruling of dischargeability under § 523(a)(6), but it went on to state that "'[i]f the ALJ made specific findings of fact with respect to the [debtor's] intent as to the employees,'" those findings would be given preclusive effect and accepted as binding upon the Bankruptcy Court. See Bankr. Dkt. 39 at 5 (quoting *In re Gordon*, 303 B.R. at 657). However, the Bankruptcy Court's review of the underlying labor proceedings revealed that the only finding of fact made by the ALJ with regard to Calvert's intent was that Calvert acted out of "antiunion animus" in discharging the employees. *Id.* at 5–6. Because this finding of antiunion animus, alone, was insufficient to establish maliciousness under § 523(a)(6), the Bankruptcy Court denied the NLRB's motion for summary judgment and stated that it would "analyze whether the facts proven at trial, particularly with respect to the intent of Calvert to harm the subject employees, will support a conclusion of nondischargeability." *Id.* at 6.

We have no indication that the Bankruptcy Court discarded the NLRB's finding of antiunion animus in weighing the evidence here. Rather, it appears that the only new evidence adduced at trial was that, following the Union's loss in the September 2002 election, Calvert's company switched to temporary employees in order to avoid the costs associated with any further audits being conducted by the Indiana Department of Labor,

but that, at the time he made the cost-saving decision, he was unaware that the ALJ would, a year later, order a new election or that the ALJ's decision would be affirmed two years later by the NLRB. See Dkt. 11-4 at ¶ 14. Weighing the NLRB's finding of antiunion animus (which the Bankruptcy Court had already stated could not by itself establish malice) against this newly-developed evidence regarding Calvert's motives and knowledge, the Bankruptcy Court held:

> The NLRB did not present evidence from which the Court can conclude that, at the time the decision was made, it was more likely than not that Calvert consciously disregarded the organization rights of the Company's employees when Calvert presented uncontroverted evidence of a legitimate business reason for the layoffs/promotions.

Id.

"The question whether an actor behaved willfully and maliciously is one of fact." *Horsfall*, 738 F.3d at 776. As such, we must accept the Bankruptcy Court's finding that Calvert did not act maliciously within the meaning of the dischargeability exception so long as that finding is not "clearly erroneous." *See Matter of Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994); *see also* 11 U.S.C. § 523(a)(6); Fed. R. Bankr. P. 8013. "Under this standard, if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighed the evidence differently as trier of fact." *Matter of Love*, 957 F.2d 1350, 1354 (7th Cir. 1992). Indeed, reversal under the clearly erroneous standard is only warranted if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*, *citing*, *EEOC v. Sears, Roebuck &*

Co., 839 F.2d 302, 309 (7th Cir. 1988). We are left with no such conviction here. It appears that the Bankruptcy Court was persuaded by the testimony elicited from Calvert during his trial that, at the time he made the decision to eliminate his full-time workforce in favor of less-expensive temporary workers, he did not know whether there would be a union going forward, nor was he aware that the NLRB would throw out the September 2002 elections results, find that his company engaged in unlawful conduct under the NLRA, and order a new elections to be held, but instead he believed that the switch was a legitimate cost-saving measure. See Bankr. Dkt. 56. As the Seventh Circuit instructs, "We must be especially deferential toward a trial court's assessment of witness credibility." *Horsfall*, 738 F.3d at 776. With that deference in mind, we do not find the Bankruptcy Court's conclusion to be clearly erroneous. Accordingly, we accept the Bankruptcy Court's finding that the NLRB failed to establish by a preponderance of evidence that Calvert acted with the requisite malice to except his debt owed to the Company's former employees from dischargeability pursuant to 11 U.S.C. § 523(a)(6).

Conclusion

For the reasons detailed above, the Bankruptcy Court's ruling is AFFIRMED in all respects. Final judgment shall issue accordingly.

IT IS SO ORDERED.

Date: 3/31/2017

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
	)	No. 1:16-cv-00161-SEB-MJD
vs.	)	
EDWARD LEE CALVERT,	)	
Appellee.	)	

JUDGMENT

Pursuant to the Court's ruling simultaneously entered on this date, the decision of the Bankruptcy Court is AFFIRMED.

IT IS SO ORDERED.

Date: 3/31/2017

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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